

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION,
ANNIE LAURIE GAYLOR and
DAN BARKER,

Plaintiffs,

v.

ELIZABETH BURMASTER and
MARK MCGUIRE,

Defendants,

and

CHILD EVANGELISM FELLOWSHIP
OF WISCONSIN, INC.,

Intervenor Defendant.

ORDER

08-cv-391-bbc

Plaintiff Freedom from Religion Foundation is a Wisconsin nonprofit organization devoted to preserving the separation of church and state. Plaintiff Annie Laurie Gaylor is the co-president of the organization; plaintiff Dan Barker is a member. In their complaint, plaintiffs allege that defendant Child Evangelism Fellowship of Wisconsin Inc. is a religious organization that solicits children at schools in the Rio Community School District with the

permission and assistance of defendant Elizabeth Burmaster (the state superintendent of public instruction) and Mark McGuire (the school district administrator).

The focus of the complaint is that defendants are violating Article I, § 18 of the Wisconsin Constitution, which limits the use of state funds for religious groups, and § 24, which allows the state legislature to authorize religious groups to use school buildings during nonschool hours if they pay “reasonable compensation for such use.” Although plaintiffs do not mention the First Amendment specifically in their complaint, they contend that defendants are “violating the Wisconsin and United States Constitutions,” *cpt.*, *dkt. # 1*, *exh. 2* at 7, and ask for a declaration that “the posting of religious solicitations by the Rio Community School District gives the appearance of religious endorsement in violation of the Wisconsin and United States Constitutions,” *id.* at 8.

Plaintiffs filed this lawsuit in state court, but defendants removed the case to this court, contending that jurisdiction is present under 28 U.S.C. § 1331 because plaintiffs are “asserting a claim under the United States Constitution.” *Dkt. #1*, at 3, ¶ 9. Defendants then moved to dismiss the federal claims on the ground that plaintiffs lacked standing to sue under Article III of the federal Constitution.

In an affidavit filed in response to these motions, counsel for plaintiffs says that the foundation has standing to sue because some of its members have children in the Rio Community School District. *Dkt. #29*, at ¶¶ 7-9. Nevertheless, counsel states that

“plaintiffs do not object to having this case remanded back to the circuit court for Dane County, Wisconsin, if the defendant[s] wish to continue [their] objection[s] to this Court’s jurisdiction.” Id. at ¶12. Plaintiffs repeat this position in a document titled, “Consent to Remand to State Court.” Dkt. #33.

I construe plaintiffs’ submissions as a concession that removal was proper because their complaint raises a federal claim, but that they wish to voluntarily dismiss that claim so that the case may be remanded to state court. Plaintiffs are correct that once the federal claim drops out, continuing to exercise supplemental jurisdiction over the state law claims would be inappropriate in light of the early stage of the case. 28 U.S.C. § 1367(c)(3); Segal v. Geisha NYC LLC, 517 F.3d 501, 506 (7th Cir. 2008). (The parties appear to agree that diversity jurisdiction does not exist.) Accordingly, IT IS ORDERED that plaintiffs’ motion to voluntarily dismiss their federal law claims under Fed. R. Civ. P. 41 is GRANTED and this case is REMANDED to the Circuit Court for Dane County, Wisconsin for resolution of plaintiffs’ state law claims.

Entered this 6th day of November, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge